



**Jitegemee Sacco Society Limited v County Government of Mombasa & another  
(Constitutional Petition 6 of 2022) [2023] KEELRC 1930 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1930 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CONSTITUTIONAL PETITION 6 OF 2022**

**AK NZEI, J  
JULY 31, 2023**

**BETWEEN**

**JITEGEMEE SACCO SOCIETY LIMITED ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**C.E.M. FINANCE & ECONOMIC PLANNING, COUNTY GOVERNMENT OF  
MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petition herein, titled “Constitutional Petition No. 6 of 2022” was filed on 13/4/2022, and was filed contemporaneously with an evenly dated urgent Chamber Summons seeking orders that the petition be certified a urgent and be admitted for hearing during the Court vacation subsisting as at that date. The application was placed before me under vacation Rules on 14/4/2022. I certified the petition as urgent and directed that the same be served within specified timelines, and be mentioned in Court on 26/4/2022 for directions.
2. When the petition came up for mention before me on 26/4/2022, both parties were represented by Counsel, and upon hearing submissions by Counsel for both parties, I gave the following directions:-
  - a. the Respondents are granted 21 days to file and serve responses to the petition.
  - b. the Petitioner will file and serve a further affidavit and written submissions on the petition within 14 days of service by the Respondents.
  - c. the Respondents will file and serve their written submissions within 14 days of service by the Petitioner.
  - d. parties may, in the meantime, engage each other on the possibility of resolving the matter amicably.



- e. mention on 27/6/2022 for further directions.
3. The matter subsequently came up in Court on 27/6/2022, 25/7/2022, 26/9/2022, 8/12/2022 and 27/2/2023. On each of those dates, Counsel for both parties informed the Court that parties were negotiating the matter, and needed more time to conclude those negotiations and to record settlement. Indeed, it is the Petitioner's Advocate who, on 8/12/2022 and 27/2/2023, specifically requested that the matter be taken out to give negotiations a chance. It was, therefore, quite amazing to hear the Petitioner's Advocate appearing to complain in Court on 15/5/2023 that it had been over a year since the Petition was certified urgent, and that the Respondents were yet to file responses to the Petition.
  4. Having noted, on 15/5/2023, that the Respondents had not filed any response to the petition, and that the directions given by the Court on 26/4/2022 on filing of submissions had neither been vacated nor set aside, I directed both parties to file written submissions within specific timelines, and fixed the matter for highlighting of submissions on 29/5/2023.
  5. As on 29/5/2023, the Petitioner's Advocate had filed written submissions while the Respondent's Advocate had not. The Petitioner's Advocate told the Court that he did not wish to highlight on his submissions. I fixed the matter for judgment on 31/7/2023, and gave Counsel for the Respondents 3 days to file and serve written submissions. No submissions were filed within the time specified by the Court, and the written submissions eventually filed by the Respondents on 9/6/2023 addressed matters of fact, yet the Respondents had not filed any response to the Petition. It must be noted that submissions, written or oral, cannot be a substitute for response to a petition, suit or an application. In my view, submissions by a party which/who has not filed any response can only be relevant in a suit and/or petition to the extent to which such submissions address pure points of law that could otherwise have been raised by way of a preliminary objection. The Court of Appeal stated as follows in the case of *Daniel Toroitich Arap Moi -vs- Mwangi Stephen Murithi & Another* [2014] eKLR:-

“Submissions cannot take the place of evidence. What appeared in submissions could not come to his aid. Such cause only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented...”
  6. Still on the same point, the Industrial Court in *Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA) -vs- North Beach Hotel* [2015] eKLR, (Rika, J) stated as follows:-

“.....the Court has time and again stated that closing submissions should not serve as a forum for adducing additional evidence. It is simply a forum for arguing one's case on the basis of the recorded evidence...”
  7. The petition herein, which indeed is a money claim, stands unopposed/undefended. I say money claim because parties are bound by their pleadings, and the Petitioner pleaded as follows:-
    - a. that the Respondent deducted monies from the Petitioner's members who are its employees, but failed and/or refused to remit the same to the Petitioner as required.
    - b. that vide a letter dated 16/6/2014, the Respondents admitted that the unremitted sum stood at ksh. 52,849,902.95; and that in a meeting held between the parties herein on 4/2/2015, both parties mutually agreed that the aforesaid sum would be paid by the Respondents in five instalments.



- c. that the Respondents did not remit the deductions, and that vide a letter dated 2/4/2015, the Petitioner requested the Respondents to remit the deductions which then stood at ksh. 83,789,727.08.
  - d. that vide a letter dated 6/5/2015, the Respondents requested that the sum due be capped at ksh. 62,252,087.30, and that they be allowed to pay the same by monthly instalments of ksh. 5,000,0000 with effect from 14/5/2015.
  - e. that vide a letter dated 3/9/2015, the Petitioner acknowledged receipt of a sum of ksh. 10,960,751.61 from the Respondents, penalties of ksh. 14,097,872.75 and demanded payment of the balance of ksh 48,543,773.75.
  - f. that the Respondents failed to pay the outstanding unremitted deductions, and has continued holding further deductions from the Petitioner's members.
  - g. that by February 2021, the unremitted deductions stood at ksh. 113,191,157.56; and that vide a letter dated 12/2/2021, the Commissioner, Ministry of Agriculture, Livestock, Fisheries & Cooperatives (Commissioner) send a statutory notice to the Respondents demanding that the Respondents pay the unremitted deductions amounting to ksh. 113,191,157.56 together with compounded interest and penalties within 14 days. That the Respondents did not comply with the said notice.
  - h. that the Respondents requested for a tabulation of the accrued unremitted deductions, which the Petitioner forwarded vide a letter dated 14/6/2021; giving a break down/tabulation of ksh. 132,488,663.81, which the Respondents have not settled.
  - i. that by October 2021, the unremitted deductions stood at ksh. 139,106,651.36, and that vide a letter dated 21/10/2021, the Commissioner send a statutory notice to the Respondent demanding that they pay the unremitted deductions of ksh. 139,106,651.36 together with compound interest and penalties to the Petitioner within 14 days; but the Respondents did not pay.
  - j. that by 3/3/2022, the unremitted deductions together with interest and penalties stood at ksh. 206,928,312; and that the Petitioner has tried, without success, to have the amount settled.
  - k. that the Respondents' act of failing to remit the deductions from the Petitioner's members are illegal and in contravention of *the Constitution* of Kenya 2010 – Articles 10,41(2), (4) and (5), and 47.
8. The Petitioner set out its claim against the Respondent as follows:-
- a. a declaration that the Respondent acted illegally and unconstitutionally in the manner in which it failed to remit the Petitioner's members' dues as and when the same were deducted.
  - b. a declaration that the Respondents are in violation of Articles 10,41, and 47 of *the Constitution* of Kenya 2010 and the provisions of the Fair Administrative Actions Act in the manner in which it failed to remit the Petitioner's members' dues as and when the same were deducted.
  - c. that judgment be entered in favour of the Petitioner in the sum of ksh. 206,928,312.
  - d. that a consequential order of mandamus be issued to compel the Respondents to settle the unremitted dues in the sum of ksh. 206,928,312.
  - e. interest on (c) above from the date of filing the petition.



- f. General damages for violation of the Petitioner’s fundamental rights.
  - g. that costs of the petition be paid to the Petitioner.
9. The petition is supported by an affidavit of one Peter Somba, the Petitioner’s CEO, sworn on 12/4/2022; to which the evidential documents referred to in the petition, among others, are annexed.
  10. As I preceded to point out in this judgment, the Petitioner’s claim herein is a simple money claim by a Sacco Society, claiming payment of unremitted deductions made from its members by the members’ employer (the Respondents). The petition, in my view, did not raise any constitutional issues. It did not raise any question of interpretation or application of *the Constitution* or demonstrate violation of fundamental rights and freedoms or threat to such rights and freedoms. The Court of Appeal stated as follows in the case of *Sammaya Athman Hassan -vs- Paul Masinde Simidi & Another* [2019] eKLR:-

“It is evident that the petition was hybrid combining violations of various rights, employment rights under the *employment Act* and breach of Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1<sup>st</sup> Respondent by the Corporation Appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the Petition, the ELRC relied wholly on the provisions of the *Employment Act*.

The Article 41 rights are enacted in the *employment Act* and *Labour Relations Act*. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1<sup>st</sup> Respondent filed a petition directly relying on the provisions of *the constitution* for enforcement of contractual rights governed by the *Employment Act* without seeking a declaration of invalidity of the provisions of the *Employment Act* or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of *the Constitution*. We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in the *Communication’s Commission Case* (supra).”

11. The Petitioner’s suit herein ought to have been instituted by way of an ordinary claim, and I will treat it as an ordinary claim. The single issue that presents for determination is whether the Petitioner is entitled to the reliefs sought.
12. There being no constitutional issue raised in the petition, the prayers for declaratory orders and the prayer for general damages for violation of the Petitioner’s fundamental rights are declined.
13. On the claim for ksh. 206,928,312, it is to be noted that the suit herein is not defended, and that there is substantial evidence presented by the Petitioner which demonstrates, on a balance of probability, that the sum claimed is, indeed, owed by the Respondents to the Petitioner.
14. Consequently, and having considered the submissions filed herein, judgment is hereby entered for the Petitioner against the Respondents jointly and severally for:-
  - a. The sum of Ksh. 206,928,312.



- b. An order of mandamus compelling the Respondents to pay the said sum of ksh. 206,928,312 to the Petitioner within sixty (60) days from the date of this judgment, failing which execution proceedings may issue against the Respondents.
- c. Interest on the awarded sum shall be calculated at Court rates from the date of this judgment.
- d. Costs of the petition are awarded to the Petitioner.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31<sup>ST</sup> JULY 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Mr. Chege for Petitioner

N/A for Respondentt

